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SUBJECT: NICARAGUA: 2009 SPECIAL 301 REVIEW

REFS: A) SECSTATE 8410, B) 08 MANAGUA 1051, C) 08 MANAGUA 0225

SUMMARY

1. (SBU) Although IPR enforcement and protection remain a low priority for senior GON officials, we believe continued engagement in 2009 will have a positive effect. We cooperate well with working and mid-level police and prosecutors and we would like to step up our efforts to work with senior-level GON officials. We recommend that Nicaragua not be named to the 2009 Special 301 Watch List. See Action Request in Paragraph 6.

2. (SBU) The Government of Nicaragua's (GON) enactment of the new criminal code in July 2009 does not restrict the Nicaraguan National Police to initiate ex-officio IPR investigations, a CAFTA-DR requirement, because the 2001 criminal procedure code does. The new criminal code, however, does not allow the Prosecutor General's Office to conduct ex-officio IPR investigations without a private party making a formal complaint. The new criminal code weakens penalties for all copyright violations. Moreover, patent linkage and data protection for pharmaceutical products, which are CAFTA-DR commitments, remain unimplemented. We believe that we are making progress in these areas and plan to continue our efforts to engage with senior government officials to help them fulfill Nicaragua's CAFTA-DR commitments.

3. (SBU) Government and industry officials in the software, motion picture, and music industries are cooperating to combat piracy, trademark infringements, and copyright violations. The police, with assistance from the Prosecutor General's Office and industry, implemented a strategy in 2008 to raise public awareness to combat piracy, train staff on the application of IPR laws and the detection of pirated goods, and conduct targeted raids and seizures of pirated goods and production equipment.

CLARITY ON EX-OFFICIO ENFORCEMENT

4. (SBU) On February 19, Econoff spoke with Dr. Leyla Prado, head of the IPR Unit for the Prosecutor General's Office. Prado explained that while the new criminal code, which came into effect on July 9, 2008, does not explicitly state that the police can conduct ex-officio investigations, the 2001 criminal procedure code does. She confessed that neither her office nor the police had a clear understanding of the new criminal code until the interagency meetings with the Ministry of Trade, Industry and Development (MIFIC) cleared up matters last September (Ref B). She pointed out that the new criminal code does not allow the Prosecutor General's Office to conduct raids without a formal complaint. The 2006 Copyright Law allowed prosecutors to conduct targeted raids without a formal complaint. She complained that the new criminal code weakens her office's IPR enforcement capabilities, but acknowledged that an improved working relationship with the police allows her unit to respond quickly to formal complaints.

WEAKER PENALTIES FOR IPR CRIMES

5. (SBU) Prado admitted that penalties against copyright violations remain weak. In 2006, amendments to the Copyright Law stiffened penalties for IPR crimes, allowing fines ranging from 3,000 to 25,000 cordobas (\$150 to \$1,250) and prison sentences of up to two years. The new criminal code borrowed aspects of Sweden's penal code to calculate the fine for an IPR offender, i.e., one-third of the person's monthly salary multiplied by 90 to 150, depending on the severity of the crime. However, the new criminal code reduces prison sentences to a maximum of one year. She noted that she and her colleagues in the police and MIFIC have attempted to persuade senior government officials to revert to the 2006 Copyright Law for IPR penalties and fines.

TEST DATA PROTECTION AND PATENT LINKAGE

6. (SBU) The Pharmaceutical Research and Manufacturers of America's (PhRMA) 2009 Special 301 submission states that the GON has yet to impleme

MIXED RESULTS ON ENFORCEMENT EFFORTS

7. (SBU) The police, with assistance from the Prosecutor General's Office and local industry, implemented a strategy in 2008 to raise public awareness to combat piracy, train staff on the application of IPR laws and the detection of pirated goods, and conduct targeted raids and seizures of pirated goods and production equipment (Ref B). The police believe that their campaign has raised public awareness about pirated goods. Nevertheless, the GON did not convict, fine, or imprison an IPR offender in 2008.

8. (SBU) With regard to raids and seizures of pirated goods, the police conducted six raids in 2008, considerably fewer than the 20 raids they conducted in 2007. In 2008, the police conducted six raids and the police seized 350,000 pirated music CDs and music video DVDs, 80,000 blank CDs and DVDs, 938 drums of bottled water, 46 televisions, 12 computers, 6 recording units and 3 multicolor copiers. The monetary value of the seized goods is approximately \$803,000.

9. (SBU) The Prosecutor General's Office indicted 25 IPR offenders in 2008. Two cases are before the court awaiting a ruling while one

case was resolved through mediation. The Prosecutor General's Office also conducted two raids with assistance from the police to investigate formal complaints it received concerning trademark infringement of "Pura Fuente (Pure Fountain) and Lacoste clothing. Prado asserted that the Prosecutor General's Office would like to do more on IPR enforcement, but the loss of staff and budget cuts in fiscal year 2008 limited her unit's ability to participate in raids, conduct investigations, and file cases in court. She feared that more budget cuts are on the way in fiscal year 2009 because of the government's recent budget shortfall, as a result of the reduction in donor assistance to the GON based on the fraudulent November 9, 2008, municipal elections.

COOPERATION AND TRAINING

¶10. (SBU) Government and industry officials in the software, motion picture, and music industries are cooperating to combat piracy, trademark infringements, and copyright violations. A representative of NICAUTOR, an association that advocates IPR enforcement and protection for book authors and music companies, commended the police and public prosecutors for their prompt response to formal complaints on IPR crimes. With regard to training, government and industry officials organized six IPR enforcement workshops for police, public prosecutors, and customs officials in 2008. The police seek more assistance from industry on detecting trademark and copyright infringement, and better equipment, such as computers and scanners, digital cameras, and digital product code scanners to enhance their capabilities. Post also sent three judges, two MIFIC officials, and one public prosecutor to U.S. Patent and Trademark (USPTO) training in Washington in 2008.

LOW PRIORITY FOR SENIOR GON OFFICIALS

¶11. (SBU) IPR enforcement and protection remain a low priority for senior-level GON officials. In 2008, we met frequently with working level and mid-level officials from MIFIC, the Prosecutor General's Office, and the police to encourage IPR enforcement and improve interagency cooperation to enhance IPR protection. However, these agencies are struggling with budget and staff cuts. Prado said that on occasions, the police are instructed not to pursue illegal producers and vendors because of government policies. In fact, Prado told us that President Ortega met with a national association of illegal producers and vendors of pirated goods in September 2008. The result of the meeting was that President Ortega and the association reached an informal agreement that would continue to allow the selling of pirated goods. She noted that these kinds of actions by senior-level officials deter any effective action against IPR offenders because no one wants to lose his/her job.

COMMENT AND RECOMMENDATION

¶12. (SBU) The lack of familiarity with IPR issues in MINSA impedes the implementation of test data protection. USTR's review of MINSA's interpretation on test data protection and engagement on patent linkage would likely prompt GON compliance with its CAFTA-DR obligations. We are not sure why the GON has failed to implement patent linkage, but poor interagency cooperation is partly to blame. Politics and special interests have weakened enforcement efforts to combat IPR crimes against the behest of law enforcement and trade officials.

¶13. (SBU) On the positive side, the GON has clarified that police have the authority to conduct ex-officio investigations of IPR crimes. While public prosecutors are no longer able to conduct ex-officio investigations under the new criminal code, good relations with the police allow them to respond quickly to formal complaints. We continue playing an important role in building relationships between key GON officials and industry, and in improving interagency cooperation on IPR enforcement and developing capacity with USPTO-funded training. For example, we organized a roundtable discussion on improving cooperation between the police and industry in August 2008 per the request of Major Francisco Obando, National Police Director for the Economic Crimes Unit.

¶14. (SBU) We believe that we should step up our efforts to engage senior officials to improve IPR enforcement and protection and enforcement, especially as it relates to commitments under CAFTA-DR. In 2008, the Embassy established strong ties with working and mid-level officials. Continued cooperation would raise the profile of IPR with senior officials. We believe that naming Nicaragua to the Watch List this year would complicate our efforts to help Nicaragua comply with its CAFTA-DR commitments.

CALLAHAN